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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 267

JACK H. KELLY,
Petitioner,
vs.
VINCENT W. KOSUGA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 257 F. 2d 48 (1958).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit, review of which is herein sought, was entered on the 23rd day of June, 1958. Within the ninety day period prescribed by Section 2101(c) of Title 28 U. S. C. A., the appellant filed his Petition for Writ of Certiorari with this Honorable Court on August 11, 1958. Said writ was granted on October 13, 1958.

STATUTORY PROVISIONS INVOLVED

Section 1, Title 15 of the United States Code (1940 Edition) provides at pages 1013 and 1014 of Volume I, in pertinent portions:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by section 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court * * *."

QUESTION PRESENTED FOR REVIEW

Whether the District Court of the United States for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit erred in holding that the appellant's affirmative defense, alleging a violation of the Sherman Anti-Trust Act of 1890, was insufficient, within the meaning of Rule 12(f)

of the Federal Rules of Civil Procedure and thus properly stricken, where the appellee and the appellant were both parties to an agreement whose purpose was to fix prices with respect to a commodity which was a part of interstate commerce and where the appellee was seeking to invoke the aid of the Federal District Court to enforce the very agreement which constituted, in itself, a violation of the Sherman Anti-Trust Act of 1890.

STATEMENT OF THE CASE

(Unless otherwise clearly shown by the context, figures in parentheses refer to corresponding pages of Transcript of Record)

The appellee, hereinafter referred to as plaintiff, commenced action against the appellant, hereinafter referred to as defendant, in the United States District Court for the Northern District of Illinois, Eastern Division, hereinafter referred to as District Court, on September 11, 1956. The suit, predicated upon diversity of citizenship (United States Code, Title 28, Section 1332), was brought to recover the sum of $37,342.80, which allegedly represented the unpaid balance of the purchase price of fifty (50) carloads of onions sold by the plaintiff to the defendant at the unit price of $960.00 per car, plus storage charges (R. 3-10). On March 22, 1957 the defendant filed an Amended Answer, which set up, *inter alia,* certain Affirmative Defenses and also a Counterclaim (R. 10-18). Plaintiff then filed a Motion to Strike the Affirmative Defenses in addition to a Reply to the Amended Answer (R. 18-21).

The District Court, in pursuance of its Memorandum Opinion of April 24, 1957 (R. 22-26), granted the Motion to Strike Affirmative Defenses (R. 26) and subsequently, on August 15, 1957, denied defendant's Motion for Reconsideration (R. 27-33) and reaffirmed its ruling striking

the Affirmative Defenses (R. 33). A Motion for Summary Judgment, filed by plaintiff on August 22, 1957 (R. 34-37), and opposed by the defendant (R. 37-39), was granted on October 11, 1957 (R. 44-45). Judgment in the amount of $37,342.80 with interest and costs, was entered on the Complaint in favor of the plaintiff and against the defendant, whereas the defendant's Counterclaim was dismissed (R. 44, 45).

The plaintiff alleged (R. 3; Paragraph 3 of Complaint) and the defendant admitted (R. 11; Paragraph 3 of Amended Answer) that on December 17, 1955, the plaintiff sold to the defendant fifty (50) carloads of United States No. 1 grade yellow globe onions in Chicago storage at $960.00 per car, plus storage charges incurred after the sale. The plaintiff alleged (R. 3, 4; Paragraph 4 of Complaint) and the defendant admitted (R. 11; Paragraph 4 of Amended Answer) that only the sum of $12,500.00 was paid on the account. The plaintiff sued for the unpaid balance, plus storage charges, minus the sum realized upon the sale of the thirty-seven (37) cars of onions which had not been withdrawn from storage by the defendant, the total amount sought being $37,342.80 (R. 4, 5; Paragraphs 5, 6, 7, 8 and 9 of Complaint.)

The defendant, in his Affirmative Defenses (R. 13-15; Paragraph 1 through 8 of Affirmative Defenses) and in certain other affirmative allegations contained in the Amended Answer (R. 11, 12; Paragraphs 3 and 4 of Amended Answer) assumed the legal position that the contract of sale was illegal and that, accordingly, the plaintiff, being *in pari delicto* with the defendant, could not invoke the assistance of the Court to recover the unpaid portion of the purchase price, plus storage charges (R. 15; Paragraph 9 of Affirmative Defenses). Succinctly stated, the following allegations of fact were embodied in the Affir-

mative Defenses and in other affirmative allegations contained in the Amended Answer:

The plaintiff and his associate Sam Siegel, who possessed or controlled some one thousand (1000) cars of onions in cold storage in the area of Chicago, Illinois, and in storage in the country, informed the defendant and other onion growers during the months of November and December, 1955, that unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the purpose of depressing both the futures and cash market price of onions (R. 13, 14; Paragraph 1 of Affirmative Defenses). The defendant and the other onion growers, fearful of the economic consequences which might befall them in the event the onion market were to be flooded, entered into an agreement with the plaintiff and Sam Siegel to purchase from them two hundred and eighty-seven (287) carloads of onions, of which the defendant's share was fifty (50) carloads (R. 14, 15, 11; Paragraphs 1 and 4 of Affirmative Defenses, Paragraph 3 of Amended Answer.) In consideration for the promises of the defendant and of the other onion growers to purchase the two hundred and eighty-seven (287) carloads of onions from the plaintiff and Sam Siegel and to refrain from selling said onions upon the futures market for the balance of the 1955-1956 trading season, the plaintiff and Sam Siegel promised and agreed that they likewise would forbear from selling any onions owned, held or controlled by them upon the futures market for the balance of the trading season (R. 14, 11; Paragraph 3 of Affirmative Defenses; Paragraph 3 of Amended Answer), with it being the express and avowed purpose and object of the agreement, combination, and conspiracy to fix the price and

limit the amount of onions to be sold in the State of Illinois (R. 15; Paragraph 6 of Affirmative Defenses), to create "a false and fictitious market condition" (R. 11; Paragraph 3 of Amended Answer), and to fix and manipulate the market price of onions and to stabilize said price and, if possible, increase said price (R. 15; Paragraphs 5 and 8 of Affirmative Defenses), said onions being a part of interstate commerce (R. 15; Paragraphs 7 and 8 of Affirmative Defenses).

Appeal to the United States Court of Appeals for the Seventh Circuit, hereinafter referred to as Circuit Court, was taken on October 22, 1957 from the District Court's rulings striking the Affirmative Defenses from the Amended Answer and granting the Motion for Summary Judgment with respect to both the Complaint and the Counterclaim (R. 45). The Opinion and Judgment of the Circuit Court, affirming the decision of the District Court, was filed on June 23, 1958, the Opinion being reported at 257 F. 2d 48 (1958) (R. 46-59). A Petition for Writ of Certiorari was filed with this Honorable Court on August 11, 1958, and said Petition was granted on October 13, 1958 (R. 60).

SUMMARY OF ARGUMENT

Upon a Motion to Strike Affirmative Defenses and other affirmative allegations contained in an Amended Answer, all facts which are well pled by the defendant must be deemed to be true for the purpose of determining whether an "insufficient" defense, within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure, has been alleged.

All of the pertinent cases decided by this Honorable Court, particularly the case of *Continental Wall Paper*

Co. v. Louis Voight and Sons Co., 212 U. S. 227, 29 S. Ct. 280 (1908), have recognized the principle that where the seller and the purchaser of an article or merchandise in interstate commerce enter into a contract to sell and purchase which is violative of the Sherman Anti-Trust Act of 1890, and the seller seeks to recover under the very contract to sell and purchase which constitutes a violation of the Sherman Anti-Trust Act of 1890, the purchaser may successfully urge the violation of the Sherman Anti-Trust Act of 1890 as an affirmative defense, as under these circumstances, the illegality inheres in, rather than being collateral to, the contract to sell and purchase. The rule of law is admittedly different when the seller of an article or merchandise in interstate commerce and parties other than the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act of 1890, and the seller subsequently enters into a separate and distinct contract to sell and purchase with the purchaser. In such a situation, if the seller sues upon the contract to sell and purchase, the purchaser cannot successfully urge, as a defense, the mere illegal character of the seller, as, under such circumstances, the illegality involved in the original agreement which is violative of the Sherman Anti-Trust Act of 1890 is collateral to the independent and subsequent contract to sell and purchase upon which suit is brought by the seller against the purchaser.

The averments contained in the Affirmative Defense and in certain affirmative allegations in the Amended Answer set forth facts which patently indicate that the plaintiff and the defendant herein entered into a contract to sell and purchase onions in interstate commerce, with the express purpose of said agreement being to fix the price of onions. This agreement was in direct violation of the Sherman Anti-Trust Act of 1890 and thus the Dis-

trict Court erred in striking the defense alleging this violation of the Sherman Anti-Trust Act of 1890.

Public policy considerations require that the courts allow those who are *in pari delicto* to remain in a *status quo* in order to deter future wrongdoers from entering into illegal contracts. Hence, the defense of illegality is given judicial sanction, not for the benefit of the defendant, but because public policy demands that the courts should not lend judicial aid to parties to illegal contracts.

ARGUMENT

WHERE THE PLAINTIFF AND THE DEFENDANT ARE BOTH PARTIES TO AN AGREEMENT, COMBINATION, AND CONSPIRACY TO FIX PRICES WITH RESPECT TO A COMMODITY WHICH IS A PART OF INTERSTATE COMMERCE AND WHERE A CONTRACT OF SALE WAS INTENDED BY SAID PARTIES TO BE AND WAS, IN FACT, AN INTEGRAL PART OF THE ILLEGAL SCHEME, THE DEFENDANT, AS THE PURCHASER, MAY ASSERT THE DEFENSE OF ILLEGALITY, PREDICATED UPON THE SHERMAN ANTI-TRUST ACT OF 1890, TO THE ACTION OF THE PLAINTIFF, AS THE SELLER, TO RECOVER DAMAGES RESULTING FROM THE DEFENDANT'S REFUSAL TO TAKE DELIVERY OF THIRTY-SEVEN (37) CARLOADS OF ONIONS AND TO PAY THE OUTSTANDING BALANCE UPON THE PURCHASE PRICE

The District Court, upon motion of the plaintiff (R. 18, 19), struck from the Amended Answer the Affirmative Defenses and certain affirmative allegations contained in the Amended Answer relating, *inter alia*, to the defense that the plaintiff could not recover the unpaid balance of the purchase price since the contract of sale with respect to the onions in question, being violative of the Sherman Anti-Trust Act of 1890 (U. S. Code, Title 15, Section 1) was unenforceable (R. 33). In determining whether the District Court erred in making such a ruling and whether

the Circuit Court erred in affirming the ruling of the District Court, this Honorable Court, as it previously was incumbent upon said District Court and said Circuit Court, must ascertain whether an "insufficient" defense, within the contemplation of Rule 12(f) of the Federal Rules of Civil Procedure, was alleged, always keeping in mind the fundamental principle that, upon a motion to strike, all facts well pled by the defendant must be deemed to be true (*Town of River Junction v. Maryland Casualty Co.*, 110 F. 2d 278 (C. C. A. 5) (1940); *Barnidge v. United States*, 101 F. 2d 295 (C. C. A. 8) (1939); *Barron and Holtzoff, Federal Practice and Procedure*, Rules Edition, Volume I, Section 369, published in 1950).

Hence, in accordance with the above stated principle of law, it must be assumed, for the purpose of determining whether a sufficient defense was alleged, that:

(1) The plaintiff and one Sam Siegel, during the months of November and December, 1955, had in their possession or under their control some 600 carloads of onions in cold storage in the area of Chicago, Illinois and an additional 400 carloads of onions in storage in the country (R. 13, 14; Paragraph 1 of Affirmative Defenses) and plaintiff and his associate, Sam Siegel, represented to the defendant and to other persons who dealt in or grew onions that they, the plaintiff and Sam Siegel, owned said onions (R. 11; Paragraph 3 of Amended Answer).

(2) During the months of November and December, 1955, the plaintiff and Sam Siegel called three meetings in Chicago, Illinois for the purpose of determining whether the defendant and certain other growers of onions who possessed large quantities of onions in the country which were customarily sold through normal trade channels would agree to take and merchandise a portion of the 600 carloads of onions owned or controlled by the plaintiff and Sam Siegel in cold storage in Chicago, Illinois (R. 10;

Paragraph 2 of Amended Answer; R. 13, 14; Paragraphs 1 and 2 of Affirmative Defenses).

(3) At said meetings plaintiff and Sam Siegel represented to the defendant and the other onion growers that unless the defendant and the other onion growers purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions (R. 13, 14; Paragraph 1 of Affirmative Defenses).

(4) The defendant and the other onion growers feared that the delivery on the futures exchange of a large quantity of storage onions would seriously depress both the futures and the cash onion market, with attendant devastating economic consequences to them (R. 14; Paragraph 1 of Affirmative Defenses).

(5) At the second of said meetings, held on December 1, 1955 in Chicago, Illinois, the plaintiff and Sam Siegel agreed with the defendant and other onion growers that if the defendant and the other onion growers would purchase a portion of the 600 carloads of onions, the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season (R. 14; Paragraph 3 of Affirmative Defenses) and the defendant and the other onion growers, for their part, agreed to purchase from the plaintiff and Sam Siegel 287 carloads of onions (R. 15; Paragraph 4 of Affirmative Defenses).

(6) The defendant, as part of an overall program and as one facet of an overall agreement entered into between the plaintiff and Sam Siegel and the defendant and other onion growers, whereby the latter parties agreed to purchase the 287 carloads of onions and to desist from selling

them upon the futures market for the balance of the trading season in consideration of the promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the balance of the 1955-1956 trading season, agreed to purchase fifty (50) carloads of onion from the plaintiff and Sam Siegel (R. 11; Paragraph 3 of Amended Answer).

(7) The avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois (R. 15; Paragraph 6 of Affirmative Defenses) to fix and manipulate the market price of onions and to stablize said price and, if possible, to increase their price, said onions being a part of interstate commerce (R. 15; Paragraphs 5, 7 and 8 of Affirmative Defenses), and to create a false and fictitious market condition (R. 11; Paragraph 3 of Amended Answer).[1]

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[1] The Circuit Court, in its Opinion (R. 49), stated that the allegation "the avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce, and to create a false and fictitious market condition" was a conclusion of law, rather than an allegation of fact. Counsel for defendant vigorously take issue with this interpretation. *Webster's New International Dictionary*, at page 160, defines the word "avowed" as meaning "openly acknowledged or declared" and, at page 773, defines the word "express" as meaning "directly and distinctly stated." The plaintiff and Sam Siegel had made it abundantly clear to the defendant and other onion growers that if they did not purchase a large portion of the onions then owned by the plaintiff and Sam Siegel, the plaintiff and Sam Siegel would "dump" large quantities of onions on the futures exchange in order to depress the futures and cash market price of onions (R. 14). Confronted with the prospect of economic catastrophy, the defendant and other onion growers agreed to purchase some 287 carloads of onions from the plaintiff and Sam Siegel (R. 11, 14, 15), with it being, as alleged, the actual object or, to use a synonym, purpose of the parties to fix the price of onions in order to stabilize their price or, if possible, in order to increase their price.

The issue to be resolved scarcely presents a matter of first impression, but rather it may be decided by applying the clear legal principles which were laid down by this Honorable Court in the case of *Continental Wall Paper Co. v. Louis Voight and Sons Co.*, 212 U. S. 227, 29 S. Ct. 280 (1908), principles which the Circuit Court held to be inapplicable to the factual situation presented (R. 49-55). The Circuit Court, instead, by the simple, although erroneous, process of misconstruing the *ratio decidendi* of the *Continental* case, *supra*, held that the instant cause is controlled by the holdings of this Court in the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431 (1902), and in its progenies, *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 S. Ct. 398 (1915); *Small Co. v. Lamborn & Co.*, 267 U. S. 238, 45 S. Ct. 300 (1925); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 67 S. Ct. 1015 (1947).

A reading of the *Continental* case, *supra*, pertinent extracts of which are set out below, as well as a reading of the other four cases above mentioned, leads inexorably to the conclusion that the factual situation herein presented closely parallels that which is found in the former case and that its rationale is dispositive of the question under discussion.

In the *Continental* case, *supra*, the plaintiff brought an action against the defendant to recover the sum of $56,762.10, the alleged balance on an account for merchandise sold and actually delivered. The defendant, as one of its defenses, asserted that it, along with the plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act of 1890 and that the contract of sale was an inherent part of the illegal scheme. The plaintiff's demurrer to this defense was overruled by the

trial court, which entered judgment for the defendant, and the ruling of the trial court was upheld by the Circuit Court of Appeals (*Continental Wall Paper Company v. Louis Voight and Sons Company,* 148 F. 939 (C. C. A. 6) (1906).) In affirming the judgment, this Honorable Court, speaking through Justice Harlan, first distinguished the *Connolly* case, *supra:*

> "But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 545, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431. Let us see what that case was and whether it may not be distinguished from the one now before us.
>
> "The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois, on account of the purchase by the defendant from that company, under contracts made in that state, of sewer pipe known as Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that state. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that, at the time of their respective purchases, that company was in a combination with certain firms, corporations, and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United

States and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several states, contrary not only to the anti-trust act of Congress of July 2d, 1890, chap. 647, but contrary to the Illinois anti-trust statute of January 1st, 1893, forbidding, under penalties, the combination of capital, skill, or acts for certain specified purposes. 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. Ill. Laws 1893, p. 182; Hurd's Rev. Stat. (Ill.) 1899, p. 618, title 'Criminal Code'.

"The defense based upon the principles of the common law was overruled in the Connolly case, the court saying: 'Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe.' Again, after referring to several cases establishing the general principle that a court will not lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded: 'In the present (Connolly) case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of

Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not, for that reason, forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principle of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe.'

"Turning to the defense based on the anti-trust act of Congress, the court in the Connolly case said: 'Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired

or which came into its possession for the purpose of being sold,—such property not being, at the time, if the course of transportation from one state to another or to a foreign country. *The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.'* Further: 'Nor can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have

directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that " unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute".

"We need not here refer to that part of the Connolly case relating to the defense based on the anti-trust act of Illinois; for the court adjudged that act to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the state, except a named favored class.

"The present case is plainly distinguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, **nor part of nor in execution of any general plan or scheme that the law condemned.** *The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluding by reason* **alone** *of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained,*

either upon the principles of the common law or under the anti-trust act of Congress.'' (Emphasis by court in boldface; italic emphasis supplied (29 S. Ct. 290, 291).)

The Court then turned its attention to the case before it and enunciated the principle of law which fits the case now at bar like the proverbial glove:

> "The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, **it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts to an illegal scheme.** We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up **in execution of the agreements** that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.
>
> *"The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, 'to which both the plaintiff and the defendant were parties, and* **pursuant to which'** *the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continetal Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constitute the forbidden combination.* These considerations make it evident that

the present case is different from the Connolly case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground merely that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly case.[2] *The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends.* We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may some-

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[2] Likewise, the *D. R. Wilder Mfg. Co.* case, *supra*, *Small Co.* case, *supra*, and *Bruce's Juices* case, *supra*, presented, in each instance, a situation where the defendant was not a party, but rather was a stranger to, the agreement which was violative in the cases of *Wilder* and *Small*, of the Sherman Anti-Trust Act of 1890 and in the case of *Bruce's Juices*, of the Robinson-Patman Act (U. S. Code, Title 15, Section 13, 13a) and where the defendant was seeking to avoid payment merely because of the illegal character of the seller.

times be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

"In *Hanauer v. Doane,* 12 Wall. 342, 349, 20 L. ed. 439, 441, this court said: 'The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.'

"In *McMullen v. Hoffman,* 174 U. S. 639, 654, 669, 43 L. ed. 1117, 1123, 1128, 19 Sup. Ct. Rep. 839, 845, 851, where the authorities are reviewed and the whole subject carefully examined, the court said: 'The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,'—citing many English and American cases. 'The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the

> defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.'" (Emphasis by the Court in boldface; italic emphasis supplied (29 S. Ct. 291, 292).).

It is submitted that the following principles of law may be deduced from a reading of the five cases which represent the collective thinking of this Honorable Court in the area of law under discussion:

1. That where the seller and the purchaser enter into a contract to sell and purchase which is violative of the Sherman Anti-Trust Act of 1890, and the seller seeks to recover under the very contract which constitutes a violation of the Sherman Anti-Trust Act of 1890, the illegality "inheres" in the contract and the purchaser may successfully assert this illegality as a defense.

2. That where the seller and parties other than the purchaser enter into an agreement which is violative of the Sherman Anti-Trust Act of 1890 and the seller subsequently enters into a separate and distinct contract to sell and purchase with the purchaser, the illegality arising from a violation of the Sherman Anti-Trust Act of 1890 in the initial agreement is collateral to, and not inherent, in the contract to sell and purchase and the purchaser,

accordingly, cannot successfully urge, as a defense, the mere illegal character of the seller in a suit brought by the seller under the contract to sell and purchase.

While it is readily apparent to counsel for defendant that the distinction between the *Continental* case, *supra,* and the earlier *Connolly* case, *supra,* is that in the former the illegality "inhered" in the agreement upon which the seller sought to recover, whereas in the latter the illegality was collateral to the contract of sale upon which the seller sought to recover,[3] the Circuit Court attempted to, in its Opinion of June 23, 1958 (R. 51, 52) to explain the differences in the results reached by characterizing the alleged violations of the Sherman Anti-Trust Act of 1890 as "vicious" in the *Continental* case, *supra,* and as "innocuous" in the *Connolly* case, *supra.* Not only is there no basis in either the *Continental* case, *supra,* or the *Connolly* case, *supra,* to justify the distinction drawn by the Circuit Court, but also, it is submitted that the Sherman Anti-Trust Act of 1890 neither expressly nor implicitly recognizes that one violation thereof is more heinous than another, once a determination is made that a particular act or course of conduct does in fact constitute a violation.[4]

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[3] Precisely similar analyses of the distinction between the *Continental* case, *supra,* and the *Connolly* case, *supra,* have been made in the following cases decided by various Circuit Courts of Appeal, *Bell v. Lamborn,* 2 F. 2d 205 (C. C. A. 4) (1924); *Milliken-Tomlinson Co. v. American Sugar Refining Co.,* 9 F. 2d 809 (C. C. A. 1) (1925); *Lyons v. Westinghouse Electric Corporation,* 222 F. 2d 183 (C. C. A. 2) (1955); (accord: *Boatmen's Bank of St. Louis v. Fritzler, et al.,* 175 F. 185 (Circuit Court D. Kansas) (1909); *Fox Film Corporation v. C. & M. Amusement Co.,* 58 F. 2d 337 (D. C. S. D. Ohio) (1932)).

[4] Even if the test to determine whether a violation of the Sherman Anti-Trust Act of 1890 could be successfully urged as a defense in an

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When one comprehends the true distinction between the *Continental* case, *supra*, and the *Connolly* case, *supra*, and then indulges, as he must, upon a motion to strike, in the assumption that the averments of fact contained in the Affirmative Defenses and the Affirmative Allegations of the Amended Answer are verity, one is necessarily impelled to conclude that both the District Court and the Circuit Court erred in holding that the defendant had failed to allege a sufficient defense to the plaintiff's cause of action. The instant record presents a picture where the plaintiff is attempting to recover damages for the breach of the *very* agreement whose avowed purpose and object was to fix and manipulate the price of onions which constituted a part of interstate commerce (R. 11, 15). In other words, in contrast to the situation in the *Connolly* case, *supra*, the plaintiff herein, in order to prove his case, must ask and did ask the District Court to enforce the payment of the price of onions in pursuance of a contract which was intended by the parties to be and which was,

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action brought by the seller were to depend upon the relative seriousness of the violation, a standard of measurement which it is submitted would defy application, certainly, in view of the consistency with which this Court has condemned price fixing as being illegal *per se*, whether the prices fixed be reasonable or not (*United States v. Paramount Pictures*, 334 U. S. 131, 68 S. Ct. 915 (1948); *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305, 76 S. Ct. 937 (1956); *United States v. New Wrinkle, Inc.*, 342 U. S. 371, 72 S. Ct. 350 (1952); *United States v. Frankfort Distilleries*, 324 U. S. 293, 65 S. Ct. 661 (1945); *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811 (1940)), the price fixing agreement herein alleged would necessarily have to be regarded as a grave violation of the Sherman Anti-Trust Act of 1890. In this respect, it should be noted that the Circuit Court, in its Opinion of June 23, 1958 (R. 54) intimated, without actually deciding, that the so-called condition of non-delivery was not illegal, notwithstanding the fact that the condition of non-delivery was the means, and understandably so in view of the law of supply and demand, by which the parties sought to stabilize the price of onions and, if possible, to increase their price.

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in fact, an agreement to fix prices. This is not a situation where the plaintiff and Sam Siegel agreed, conspired and combined to restrain trade in interstate commerce with X, Y, Z, etc., and subsequently the defendant, in a separate, independent and collateral agreement, purchased onions from one of the parties to the illegal combination and conspiracy, the factual situation existing in the *Connolly* case, *supra*, and in two of its three offsprings.[5]

This is, the record clearly reveals, a situation where, *aliunde* the agreement, an integral portion of which the plaintiff seeks to enforce, there is no pre-existing agreement, combination, or conspiracy in restraint of trade in interstate commerce. The defendant and other onion growers, having been informed by the plaintiff and Sam Siegel that the latter would flood the onion market and thus depress the price unless the former agreed to purchase a portion of 600 carloads of onions owned, held or controlled by the plaintiff and Sam Siegel (R. 13, 14; Paragraph 1 of Affirmative Defenses) and facing the unhappy alternatives of either purchasing a portion of said onions or suffering a severe pecuniary loss (R. 13, 14; Paragraph 1 of Affirmative Defenses), became unwilling parties to an agreement and members of a combination and conspiracy to fix and manipulate the price of onions which constituted a part of interstate commerce (R. 11; Paragraph 3 of Amended Answer; R. 15; Paragraphs 4, 5, 7, and 8 of Affirmative Defenses). This combination and conspiracy literally arose by virtue of the agreement by the terms of which the defendant and the other onion growers made promises to purchase 287 carloads of onions

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[5] In the case of *Bruce's Juices, supra*, the plaintiff allegedly was in violation of the Robinson-Patman Act, but, as was true in the *Connolly* case, *supra*, the *Wilder* case, *supra*, and the *Small* case, *supra*, the defendant was a stranger rather than a party to the alleged violation and thus he could not successfully urge the violation as a defense.

and to refrain from selling these onions upon the futures market during the 1955-56 trading season, in return for which the *quid pro quo* to be received by them from the plaintiff and Sam Siegel, in addition to the promise of the latter men to deliver the onions, was their promise to forbear from selling any other onions owned, held or controlled by them during the balance of the trading season upon the futures market, the avowed and express object and purpose of the agreement being to create a fictitious market condition in onions, to fix the price at the then prevailing price or, if possible to increase the price (R. 11; Paragraph 3 of Amended Answer; R. 14, 15; Paragraphs 3, 4, 5, 7 and 8 of Affirmative Defenses).

In view of the terms of this agreement and in view of the fact that the sale of the fifty (50) carloads of onions to the defendant was in pursuance of the agreement and was an essential part thereof, this Honorable Court's decision in the *Continental* case, *supra,* would certainly sustain the premise of defendant that a legally sufficient defense, invulnerable to attack by a Motion to Strike, was alleged and that the District Court erred in striking the Affirmative Defense predicated upon an alleged violation of the Sherman Anti-Trust Act of 1890.

In an apparent effort to avoid the inevitable consequences of applying the holding of this Honorable Court in the *Continental* case, *supra,* to the facts before it, the Circuit Court attributed to the word "inhere" a different meaning than that placed upon the term by this Honorable Court in the *Continental* case, *supra.*[6] The Circuit

[6] A reading of the Circuit Court's Opinion of June 23, 1958 (R. 52) clearly indicates that its ultimate decision was somewhat dictated by the fact that it considered it to be an incongruous result to allow a party *in pari delicto* to avoid payment, whereas a stranger, innocent of any

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Court, by ignoring the true purpose of the overall agreement between the plaintiff and Sam Siegel, on the one hand, and the defendant and the other onion growers, on the other hand, sought to segregate and isolate the so-called condition of non-delivery from the other terms and conditions of the agreement and then concluded that the defendant's promise to pay for the fifty (50) carloads of onions was supported by the lawful consideration of the plaintiff's promise to deliver said onions (R. 54, 55). The Circuit Court took the position that since the plaintiff was not seeking to enforce the mutual promises to refrain from delivering onions during the balance of the trading season upon the futures market, the illegality, if any, in these mutual promises was collateral to, rather than inherent in, the promise of the defendant to pay for the fifty (50) carloads of onions (R. 54, 55) and that, accordingly, the de-

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wrongdoing, would not be allowed to successfully urge a violation of the Sherman Anti-Trust Act of 1890 as a defense. The fallaciousness of the Circuit Court's reasoning in this respect is obvious. Whenever the illegality "inheres" in the contract, the aid of the Court is denied, in the language of this Honorable Court at 29 S. Ct. 292 "not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of inidividual parties". Public policy considerations require that the Courts allow those who are *in pari delicto* to remain in a *status quo* in order to deter future wrongdoers from entering into illegal contracts, the theory being that to refuse to grant judicial aid to either party tends strongly towards reducing the number of such transactions to a minimum (29 S. Ct. 291). In fact, this Honorable Court, in the *Continentanl* case, *supra*, considered the public policy against the enforcement of illegal agreements to be of such vital importance that its ruling therein resulted in an appreciable windfall to the defendant, who actually took delivery of all the merchandise and then refused to pay for same. By contrast, no such windfall would accrue to the defendant herein if, as it is contended by counsel for defendant, the parties to the illegal contract are left in the *status quo*. In this respect, the record reveals that whereas the defendant had paid the plaintiff the sum of $12,500.00 on account (R. 3, 11), he only took delivery of some 13 carloads of onions, the contract price of which in toto was $11,480.00, plus storage charges (R, 3, 4, 11, 12).

fendant would not be allowed to import into the promise to pay the illegality, if any, embodied in the mutual promise to refrain from delivering onions for the balance of the trading season upon the futures market (R. 54, 55). It is quite obvious that the conclusion reached by the Circuit Court herein is not supported by the decision of this Honorable Court in the *Continental* case, *supra,* for it is most important to observe that in the *Continental* case, *supra,* this Court held that the actual receipt (not merely, as herein, an unexecuted promise of the plaintiff to deliver) of the merchandise by the defendant was not a sufficient legal consideration upon which the duty of the defendant to pay could be enforced, since the rendering of a judgment for the plaintiff would be tantamount to affording him the aid of the judiciary in enforcing an agreement which constitutes a direct violation of the Sherman Anti-Trust Act of 1890.[7]

Similarly, the plaintiff herein is seeking to invoke the assistance of the District Court to enforce, not a lawful contract to sell and purchase, but rather an unlawful contract to sell and purchase, which came into existence for

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[7] The Circuit Court primarily bottomed its conclusion that the assumed illegal condition or covenant, to-wit, that of non-delivery, could be separated from the lawful promise for a lawful consideration upon the case of *Cincinnati, Portsmouth, Big Sandy, and Pomeroy Packet Co. v. Bay,* 200 U. S. 179, 26 S. Ct. 208 (1906), but the *Cincinnati* case, *supra,* unlike the *Continental* case, *supra,* is readily distinguishable from the case at bar in that in the former case, this Court, which was, at the outset, dubious as to whether the purchaser's agreement to maintain rates even pertained to interstate commerce, noted that said agreement to maintain rates was not alleged to have entered into the consideration of the sale, whereas here the promise of the defendant and the other onion growers to purchase the 287 carloads of onions was expressly alleged to be in consideration of the promise of plaintiff and of Sam Siegel not to deliver any of the onions owned, held or controlled by them upon the futures market for the balance of the 1955-1956 trading season (R. 11, 14).

the very purpose of fixing the price of onions in interstate commerce. This agreement, in direct violation of the Sherman Anti-Trust Act of 1890 and thus permeated with illegality, cannot be enforced for the reasons set forth in the *Continental* case, *supra*. It is thus submitted that error was committed by the District Court in striking the affirmative defense and certain affirmative allegations contained in the Amended Answer wherein this violation is set forth as a defense to the plaintiff's claim.

PRAYER

Wherefore, it is respectfully submitted that the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit be vacated, that the Judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, be vacated, that the Order of said District Court striking the Affirmative Defense and certain affirmative allegations contained in the Amended Answer be vacated, and the cause be remanded to said District Court for a hearing on the merits, in accordance with the Opinion and Judgment of this Honorable Court.

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